

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BUNGIE, INC., a Delaware corporation,

Plaintiff

v.

AIMJUNKIES.COM, a business of unknown
classification; PHOENIX DIGITAL GROUP
LLC, an Arizona limited liability company;
JEFFREY CONWAY, an individual; DAVID
SCHAEFER, an individual; JORDAN GREEN,
an individual; and JAMES MAY, an individual,

Defendants.

Cause No. 2:21-cv-0811 TSZ

**DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION TO
CONFIRM ARBITRATION
AWARD AND DIRECT ENTRY
OF JUDGMENT**

**Note on Motion Calendar:
March 3, 2023**

Defendants hereby oppose Bungie Inc.' Motion to Confirm Arbitration Award and Direct Entry of Judgment for two reasons. *First*, under clear Supreme Court precedent, this Court lacks jurisdiction to provide the relief Bungie seeks. *Second*, Bungie's Motion is premature under both the Federal Arbitration Act, 9 U.S.C. § 12, and the Washington State Uniform Arbitration Act, RCW 7.04A.230.

I. INTRODUCTION

Bungie seeks confirmation of a \$4 Million arbitration award based on Defendants' *de minimis* distribution and sales of supposed "cheat software" that (1) Defendants promptly and voluntarily removed from their product list immediately after receiving a "cease and desist" letter from Bungie, and that (2) as confirmed by Bungie's own damages expert, had overall gross sales of approximately \$40,000. Defendants are well aware of the available grounds for challenging an arbitrator's award. A challenge to this award is clearly available and will be

1 the subject of a proper motion made by Defendants in a proper proceeding before a proper
 2 court. In particular, the award itself, and more importantly the Arbitrator's clear failure to
 3 follow the very rules mandated by JAMS itself, evidence either clear bias on the part of the
 4 Arbitrator or negligent failure of the Arbitrator to know the very rules he was obligated to
 5 follow. Again, such will be the subject of a formal motion to vacate to be filed by Defendants
 6 in due course and within the timelines specified by 9 U.S.C. § 12, and RCW 7.04A.230.

7 II ARGUMENT

8 A. This Court Lacks Jurisdiction To Confirm The Arbitration Award

9 Unlike in most situations wherein a separate action is filed to confirm an arbitration
 10 award, Bungie dispenses with the formalities of establishing jurisdiction, effecting service,
 11 allotting proper time for answer, etc., and simply brings its motion in this existing case.
 12 Under clear Supreme Court precedent, Bungie cannot properly do this, and this Court risks
 13 engaging in reversible error should it accede to Bungie's antics.

14 This case is based on an original Complaint (Dkt#1) filed June 15, 2021, and an
 15 Amended Complaint (Dkt#34) filed May 29, 2023. In each of these complaints, Bungie's
 16 alleges "federal question" as the *sole* basis for establishing the subject matter jurisdiction of
 17 this Court. (See, Dkt#1, ¶12, Dkt#34, ¶19.) In particular, and with respect to its Amended
 18 Complaint, Bungie alleges that, "This Court has subject matter jurisdiction over Bungie's
 19 claims for violations of the Copyright Act and the Lanham Act pursuant to 15 U.S.C. § 1121,
 20 and 28 U.S.C. §§ 1331 and 338(a)." (Dkt#34, ¶19.) As a matter of law, this is insufficient to
 21 establish subject matter jurisdiction of this Court over Bungie's effort to confirm the
 22 arbitration award.

23 In the recent Supreme Court case of *Badgerow v. Walters*, 142 S. Ct. 1310 (2022) the
 24 Supreme Court resolved a conflict among the circuits and clearly held and established that,
 25 federal jurisdiction to confirm or vacate an arbitration award *must* exist independent of the
 26 underlying controversy, and it is not sufficient for federal jurisdiction that the underlying
 27 claim the parties arbitrated arose under federal law. In particular, the Supreme Court
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expressly rejected the prior “look through” approach, wherein a court “looked through” a pleading to determine whether it was based on a federal question and, instead, required that an action seeking relief under 9 U.S.C. § 9 requires that separate jurisdictional grounds be both pleaded and established. Here, the sole basis actually pleaded in either Bungie’s original Complaint or Amended Complaint is *only* that its claims arise under federal law. Under the holding in *Badgerow*, this is insufficient. Accordingly, this Court lacks subject matter jurisdiction to consider Bungie’s motion brought under 9 U.S.C. § 9. *See, Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citing *California ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir.1979)) (“A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears.”)

Bungie should either file a separate action in this Court properly establishing federal jurisdiction or should file such an action in the Superior Court for the State of Washington, King County, as Bungie’s own “Limited Software License Agreement” so provides. Bungie’s attempt to short-circuit proceedings by “piggy-backing” onto this action, wherein the sole basis for claiming and establishing subject matter jurisdiction is “federal question,” should be seen for the procedural short cut that it is and should be rejected.

B. Bungie’s Motion is Premature

1. Defendants’ Deadline For Moving To Vacate The Final Arbitration Award Is Nowhere Near

The subject Final Arbitration Award was issued February 2, 2023. Under 9 U.S.C. § 12, Defendants have three months, i.e., until May 2, 2023, to file an action to vacate the award. We are nowhere near that deadline, and Bungie cannot properly shorten that deadline by filing a hurried motion to confirm the award. Indeed, 9 U.S.C. § 9, expressly provides that Bungie may file a motion to confirm, “at any time within one year after the award is made any party to the arbitration.” Again, we are nowhere near that deadline either. Bungie is clearly attempting to get Defendants over a barrel and deny them their rights by improperly seeking to avoid the applicable timetable by filing its motion in this pre-existing case.

1 Defendants intend to file an action to vacate the Final Arbitration Award in the proper
 2 forum, namely the Superior Court for the State of Washington, County of King, well before
 3 the three month deadline set by 9 U.S.C. § 12. This Court cannot properly short-circuit
 4 Defendants' rights by granting Bungie's motion in this case where proper subject matter
 5 jurisdiction has neither been pleaded nor established.

6 **3. Substantive Grounds For Vacating The Final Arbitration Award Exist**

7 Defendants' planned motion to vacate the Final Arbitration Award under both 9
 8 U.S.C. § 10, and RCW 7.04A.230 is based on solid grounds and will neither be frivolous nor
 9 for purposes of delay. While this is not the appropriate place to raise and consider the merits
 10 of the motion to vacate, the motion will be based at least on the following substantive ground:

11 The Arbitrator, retired Judge Ronald Cox, in opposition to Defendants' assertion that
 12 the arbitration be treated as a "consumer" arbitration, ruled in favor of Bungie, and on June 20,
 13 2022 issued an order that, "The JAMS Comprehensive Arbitration Rules & Procedures shall
 14 apply in this proceeding." (Arbitration Scheduling Order No. 1 dated June 20, 2022.)

15 During the arbitration hearing, and at the very start of Defendants' cross-examination
 16 of Bungie's principal witness, Dr. Edward Kaiser, Arbitrator Cox sustained Bungie's
 17 objection that Defendants could not use Dr. Kaiser's earlier deposition testimony during the
 18 cross-examination. Judge Cox improperly sustained the objection on the purported ground
 19 that that deposition was taken in conjunction with this case now pending in this Court, rather
 20 than pursuant to a deposition notice captioned with the arbitration proceeding. Not only was
 21 Bungie's representation a blatant refutation of an earlier agreement between Bungie and
 22 Defendants' counsel that *all* discovery taken in this case could be used in the arbitration and
 23 vice versa, Judge Cox sustained the objection without even permitting Defendants' counsel an
 24 opportunity to speak or otherwise rebut the objection. The net effect of this was to deny
 25 Defendants an opportunity to conduct a meaningful cross-examination, to impeach Dr. Kaiser
 26 with prior inconsistent deposition testimony and to point out the very serious, relevant and
 27 blatant inconsistencies in Dr. Kaiser's deposition testimony versus his entirely different
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1 testimony at the hearing. This, of course, goes directly to Dr. Kaiser's credibility and is
2 material in that Judge Cox, in his arbitration award, makes specific reference to Dr. Kaiser's
3 supposed credibility.

4 Not only did Judge Cox blindly accept Bungie's misrepresentation regarding the
5 inadmissibility of Dr. Kaiser's deposition testimony at the arbitration hearing, his doing so is
6 in *direct violation* of the very "JAMS Comprehensive Arbitration Rules & Procedures" that,
7 at Bungie's behest, Judge Cox ordered "shall apply in this proceeding." In particular, Rule 22
8 (e) of the JAMS Comprehensive Rules which governs, "The Arbitration Hearing," express
9 provides that, "The Arbitrator *shall receive and consider* relevant deposition testimony
10 recorded by transcript or videotape, provided that the other Parties have had the opportunity to
11 attend and cross-examine."¹ (Emphasis supplied.) This language is non discretionary and
12 mandates that the Arbitrator "shall receive and consider" the very deposition testimony he
13 improperly excluded at Bungie's fraudulent behest. Judge Cox had no authority to sustain
14 Bungie's objection and deny Defendants their opportunity to conduct a meaningful and
15 effective cross-examination. His blind acceptance of Bungie's baseless objection, combined
16 with his blatant failure *to follow the very rules of the organization that engages him and that*
17 *he, himself, ordered apply during the arbitration*, demonstrate either clear bias or
18 indifference to his contractual obligations on the part of Judge Cox.

19 The failure of Judge Cox to follow the mandates of the very rules he ordered would
20 apply in the arbitration is a recognized ground for vacating an arbitration award. Defendants
21 relied on the arbitration contract provided by both JAMS and Judge Cox and had every right
22 to believe that the rules and procedures published by JAMS and made part of the arbitration
23 contract would, in fact, be followed. Again, the applicable JAMS rule, with the clear and
24 direct language, "shall receive and consider," is non discretionary, and Defendants' counsel
25 had every right to believe and expect that Dr. Kaiser's prior, inconsistent deposition testimony
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27 1 There is and can be no dispute that Dr. Kaiser was represented at his deposition by the very counsel
28 that represented Bungie at the arbitration hearing and that he did, in fact, "attend and cross-examine."

1 would be received and considered during the cross-examination of Dr. Kaiser. Judge Cox's
 2 blatant failure to follow the clear JAMS rule, and his ill-considered acceptance of the
 3 misrepresentation Bungie made during its objection, materially affected and tainted the
 4 hearing and Final Arbitration Award, particular given Judge Cox's express finding that he
 5 found Dr. Kaiser's hearing testimony, "credible."

6 **3. Defendants' Right To Prepare And File A Proper Motion To Vacate In**
 7 **The Proper Court Should Not Be Curtailed**

8 Defendants' rights Under 9 U.S.C. § 12 to file a motion to vacate should not, and must
 9 not, be compromised by Bungie's rush to file this motion to confirm. Indeed, such a rush on
 10 the part of Bungie is likely why Bungie filed its motion in this proceeding rather than file a
 11 proper action in a separate proceeding that would involve, among other things, establishing
 12 proper subject matter jurisdiction of the court. Defendants need adequate time to prepare a
 13 properly supported motion to vacate and to initiate an action to do so in the appropriate court,
 14 and Defendants' statutorily provided three month period for doing so should not, and must
 15 not, be circumvented by the procedural chicanery Bungie engages in here.

16 **CONCLUSION**

17 For all the foregoing reasons, this Court should deny Bungie's motion as being beyond
 18 the established subject matter jurisdiction of this Court, and, at the very least, should delay
 19 confirmation of the award until Defendants' right to file a motion to vacate has been honored.

20 Dated February 27, 2023.

21 /s/ Philip P. Mann

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